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IN THE

Supreme Court of the United States

BETH B. and SUSAN AND TOM B.,
Individually and as Next Friends of BETH B.,

Petitioners,

v.

MARK VAN CLAY, Individually and in his Official Capacity as Superintendent, and LAKE BLUFF SCHOOL DISTRICT #65,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

JULI WILSON MARSHALL*
KATHLEEN RAVEN GURROLA
JASON D. ROSENBERG
ROBERT H. KNOWLES
LATHAM & WATKINS
233 S. Wacker Drive
Sears Tower, Suite 5800
Chicago, Illinois 60606
(312) 876-7700

* *Counsel of Record*

Attorneys for Petitioners

174624

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QUESTIONS PRESENTED

The Individuals with Disabilities Education Act ("IDEA" or "the Act") expressly provides that states must ensure that children with disabilities "are educated with children who are not disabled" to the "maximum extent appropriate." 20 U.S.C.A. § 1412(a)(5)(A). The Seventh Circuit's holding in this case that a school district could remove a thirteen year-old girl with physical and cognitive disabilities from the regular classroom, despite the fact that she was progressing toward the educational goals set for her by the school district, raises the following questions of exceptional importance that have split the courts of appeals:

1. Whether, when the evidence was inconclusive, the Seventh Circuit erred by simply deferring to a school district's decision to remove a student from the regular education classroom?
2. What is the correct test for determining whether a student's placement will mainstream her to the maximum extent appropriate?
3. Whether the Seventh Circuit's narrow focus on academic progress in determining whether a student will receive a "satisfactory" education effectively reads the presumption in favor of mainstreaming out of the IDEA?

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The independent hearing officer's opinion (Appendix C) is not otherwise published. The district court's opinion (Appendix B) is not published, but is available at 2001 WL 1095026. The Seventh Circuit's opinion affirming the district court (Appendix A) is published at 282 F.3d 493. The Seventh Circuit's opinion denying rehearing and rehearing *en banc* (Appendix D) is not otherwise published.

STATEMENT OF JURISDICTION

The Seventh Circuit entered its opinion and order on March 5, 2002, and denied rehearing and rehearing *en banc* on April 3, 2002. Petitioners invoke this Court's jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

The provisions of the Individuals with Disabilities Education Act, 20 U.S.C.A. § 1400 *et seq.*, relevant to this petition are reprinted in Appendix E.

STATEMENT OF THE CASE

I. STATUTORY BACKGROUND

For the last quarter century, Congress has mandated that children with disabilities be educated side-by-side with their nondisabled peers in a regular school setting to the maximum extent appropriate. *See* IDEA § 1412(a)(5)(A). The clear congressional preference for "mainstreaming" a child with disabilities is expressly set forth in the IDEA and in its regulations. In establishing this statutory framework, Congress gave an important voice to the parents of children with disabilities when it provided a right to participate in the development of their child's educational program and to challenge a school district's placement decision in a due process hearing.[1] Before a child may be segregated in special

1. Congress first established procedural rights for parents of children with disabilities in the Education Amendments of 1974, Pub. L. No. 93-380, 88 Stat. 484 (1974). These rights were expanded in the Education for All Handicapped Children's Act of 1975, Pub. L. No. 94-142, 89 Stat. 773 (1976), which was renamed the IDEA in 1990. *See* 20 U.S.C. §§ 1400-85.

education, a school district must establish that the child cannot receive an educational benefit in the regular classroom. The parents' voice is silenced — and the statutory framework is undermined — when courts excuse school districts from meeting this burden and defer to school districts' judgments about where a child should be educated.

In 1975, Congress passed legislation that would later become the IDEA. Before Congress stepped in, many state laws permitted the complete exclusion of students with disabilities from the classroom if school officials felt that the students would not benefit from public education. Philip T.K. Daniel, *Education for Students with Special Needs: The Judicially Defined Role of Parents in the Process,* 29 J.L. & Educ. 1, 4 n.27 (2000) (listing pre-IDEA state statutes). In North Carolina, for example, it was a misdemeanor for parents to insist that their child with a disability be educated in a regular school. Act of May 18, 1965, ch. 584, 1965 N.C. Sess. Laws 641 (amending N.C. Gen Stat. §§ 115-65 (1963)).

After persistent efforts by parents and advocates, and after two federal district courts recognized parents' rights to challenge the exclusion or expulsion of students with disabilities from the regular classroom, *see Pennsylvania Ass'n for Retarded Children v. Commonwealth*, 334 F. Supp. 1257 (E.D. Pa. 1971), and 343 F. Supp. 279 (1972); *Mills v. Bd. of Educ.*, 348 F. Supp. 866 (D.D.C. 1972), Congress intervened. As this Court observed, Congress' principal concern in enacting the IDEA was "the apparently widespread practice of relegating handicapped children to private institutions or warehousing them in special classes." *Sch. Comm. of Burlington v. Dep't of Educ.*, 471 U.S. 359, 373 (1985). Indeed, the authors of the bill that became the IDEA believed in the importance of integration as an independent goal of the Act. Senator Stafford, one of the bill's co-sponsors, observed that segregating a child with disabilities means

> isolation for the handicapped child and for the "normal" child as well. The sooner we are able to bring the two

> together, the more likely that the attitudes of each toward one another will change for the better. I firmly believe that if we are to teach our children to love and understand each other, we must give them every opportunity to see what "different" children are like.

121 Cong. Rec. 19,484 (1975). Stressing the importance of contact between students with disabilities and their nondisabled peers, Congress endorsed mainstreaming as the nation's educational policy.[2]

Congress was also concerned about protecting the rights of students with disabilities — including the right to be educated with nondisabled peers. IDEA § 1415(a); H.R. Rep. No. 94-332, at 15 (June 26, 1975); 121 Cong. Rec. 23,703 (1975) (statement of Rep. Brademas). The law created grievance procedures to ensure that, among other things, "every handicapped child is in fact being educated in the least restrictive environment." H.R. Rep. No. 94-332, at 15 (June 26, 1975). Congressman Brademas, chair of the House Select Committee on Education, stated that the new law would strengthen the Education Amendments of 1974, which sought "to provide procedures for insuring that handicapped children and their parents are guaranteed procedural safeguards in identification and placement of the handicapped children; and that where possible, the handicapped child be integrated into a normal classroom environment." 121 Cong. Rec. 23,703 (1975).

The IDEA thus establishes both substantive standards and procedural safeguards that the States must follow in order to receive federal special education funds. As commentators have noted, the Act in its present form significantly limits an

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2. Recent research on mainstreaming reaffirms that students with disabilities who have been included in regular classrooms, particularly those in their home school, have larger, more durable networks of peers without disabilities. *See, e.g.*, Office of Special Education and Rehabilitative Services, U.S. Dep't of Educ., 21st Annual Report to Congress on the Implementation of the Individuals with Disabilities Education Act, at III-23 (April 11, 2000).

educational agency's discretion as to instructional methods. *Id.* at 7; D. Huefner, *The Individuals with Disabilities Act Amendments of 1997,* 122 Educ. L. Rep. 1103, 1113 (1998).

The IDEA imposes two major and interdependent substantive requirements. First, it requires that school districts provide students with disabilities a "free appropriate public education" ("FAPE"), and second, that it educate them in the "least restrictive environment" ("LRE"). IDEA §§ 1412(a)(1), (a)(5)(A). In fact, schools may segregate children with disabilities "only when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and materials *cannot* be achieved satisfactorily." *Id.* (emphasis added). The IDEA also requires that school districts ensure that children with disabilities "are educated with children *who are not disabled*" to the "*maximum* extent appropriate" and prevent unnecessary "special education, separate schooling, or other removal of children with disabilities from the regular education environment." IDEA § 1412(a)(5)(A) (emphasis added). *Id.*

The IDEA also provides parents with a number of procedural protections. Among them is the right to be involved in the formulation of the child's individualized education plan ("IEP"), which must set forth the child's present level of educational performance, list annual goals and short-term objectives, and describe the special intervention and necessary support services. 20 U.S.C. § 1414(d). If parents disagree with a school district's proposed IEP, they have the right to a due process hearing before an independent hearing officer ("IHO"). § 1415(f). Parents may appeal the IHO's decision by bringing a civil action before a state or federal court, which, after receiving the record of the administrative hearing and hearing additional evidence at the request of a party, "basing its decision on the preponderance of the evidence, shall grant such relief as [it] determines is appropriate." § 1415(i)(2).

In *Board of Education v. Rowley*, this Court held that the FAPE requirement is modest: a placement must only "confer

some educational benefit upon the handicapped child." 458 U.S. 176, 200 (1982). This Court, however, has not yet interpreted the LRE requirement. Rather than simply applying the language of the statute, the federal courts of appeals have constructed conflicting balancing tests to determine whether a school's placement meets the LRE requirement. *See Roncker v. Walter,* 700 F.2d 1058, 1062 (6th Cir. 1983); *Daniel R.R. v. State Bd. of Educ.,* 874 F.2d 1036, 1045-46 (5th Cir. 1989); *Sacramento City Unified Sch. Dist. v. Rachel H. by Holland,* 14 F.3d 1398 (9th Cir. 1994).

II. FACTUAL BACKGROUND

Petitioner Beth B. is a 13 year-old girl from Lake Bluff, Illinois. Until recently, she attended school in Lake Bluff School District No. 65 (the "School District"). Beth has Rett Syndrome, a rare neurological disorder caused by a defective regulatory gene on the X chromosome. *Beth B. v. Van Clay*, No. 00 C 4771, 2001 WL 1095026 (September 13, 2001) (hereinafter "App. B"); Due Process Hearing Administrative Record 5736-38 (hereinafter "AR"). Because males with the disorder cannot usually survive, Rett Syndrome appears almost exclusively in females, up to 1 in every 12,000-13,000 births. AR 5700.

Rett Syndrome affects girls both physically and cognitively. *See* AR 5700; AR 5709-25. The physical symptoms include loss of controlled speech and loss of control over purposeful body movement. AR 5700. This loss of control presents itself in both involuntary body movements and extreme difficulty in breaking through the involuntary movements to execute voluntary movements, sometimes resulting in significantly delayed reaction times to stimulus. *Id.* These physical symptoms make it difficult to evaluate accurately the cognitive abilities of children with Rett Syndrome, but no one disputes that most children with Rett Syndrome have some form of impairment to their cognitive reasoning. *See* AR 5709-25.

Rett Syndrome typically involves four phases. AR 5667-68. The first phase of Rett Syndrome is marked by apparently normal development until a child is between the ages of approximately six and 18 months. *Id.* At the onset of the second phase, the child begins to lose skills that they had previously gained, including speech, the ability to walk, and coordination. *Id.* During the second phase, involuntary repetitive hand movements, such as hand wringing or hand washing, appear and the child frequently loses interest in her surroundings. *Id.* After a few weeks or months, the third phase typically begins, and interest in surroundings, alertness, attention span, and communication skills improve, although loss of speech and control over body movement typically continue. *Id.* In the final phase, after about age 10, mobility decreases, but this decline is typically accompanied by a reduction in repetitive hand movements and an increase in a child's ability to maintain eye contact as a means of purposeful communication. *Id.* Girls with Rett Syndrome have the ability to learn throughout their lives. AR 5709-25; AR 8379-80.

Beth is currently in either the third or fourth phase of Rett Syndrome. She can walk with assistance, but relies primarily on her wheelchair to sit properly and to move any significant distance. AR 1722-1723. The IHO found that Beth expresses interest in people, smiles and laughs, responds positively to music and has definite likes and dislikes, which she expresses using her eye gaze, body movements, non-verbal vocalizations, reaching out, and facial expressions. *In re Elizabeth B. and Lake Bluff Sch. Dist. 65*, Decision of the Independent Hearing Officer 46a (May 26, 2000) (hereinafter "App. C").

Beth communicates primarily through her eye gaze with the use of a communication board — a board with various pictures on it to which she can gaze to indicate her wants and needs. *Beth B. v. Van Clay,* No. 00 C 4771, Tr. at 18. Beth also communicates using various augmentative communication devices. Among these are a "talker" — a device that enables her to push buttons that trigger messages recorded by her family

and friends — and "step-by-step" switches for conversational opportunities and the sharing of information, including telling of jokes. AR 6411; AR 8553-54. Beth also uses Intellikeys, a keyboard that uses standardized symbols or customized overlays that correspond to options among which Beth can choose, allowing her to communicate. AR 0017; AR 9596-97; AR 5290-308.

While Beth's disability makes measuring her progress difficult, the evidence submitted by both parties during the administrative hearing and the three-day progress hearing held by the district court in April and May of 2001 indicates that, despite inconsistent educational support,[3] Beth has made progress toward her IEP goals during her education in a regular classroom. *See Beth B. v. Van Clay*, No. 00 C 4771, Pl.'s Ex. 5; AR 2327-35; AR 10401-13; AR 11193; AR 13226-32.

Beth was educated in a self-contained special education classroom from age three to six. *See* App. C 47a. Beth then attended regular classes in her neighborhood school from kindergarten through sixth grade. *See* App. B 15a. In accordance with her IEP, a one-on-one aide has always worked with Beth in the classroom. While in regular education classes, Beth maintained a full class schedule throughout the year, although, due to medical issues and fatigue, Beth was sometimes absent.[4] App. B 32a n.10; Tr. at 16-17. In her academic classes, Beth primarily worked with her aide, inclusion facilitator, and therapists on an adapted curriculum using adapted books, her communication board, Intellikeys and an adapted computer. Beth's aide helped facilitate the interaction with her teacher and classmates. Tr. at 113-14.

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3. Due to a high turn-over rate in recent years, Beth has not been able to work consistently with the same aide for any significant period of time. For example, during her sixth grade year, Beth had a series of five different one-on-one aides, who worked with her for periods ranging from one day to four months. Tr. at 135-36.

4. On Wednesdays, Beth attended educational, physical and speech therapy rather than classes at Lake Bluff Middle School. Tr. at 16.

Beth's adapted curriculum was designed to correspond to that of her peers. AR 6898-99. For example, when her sixth-grade language arts class read a novel about mountain climbing, Beth followed with an adapted version of the book using her Intellikeys. Tr. at 412. When students in academic classes worked in groups, Beth would actively participate with her classmates. *See* AR 6432-34; AR 6440-42; AR 6920-23. In her non-academic classes, Beth participated in group activities more frequently. In music class, for example, Beth held and tapped a tambourine, as well as a range of other percussion instruments, while the other students sang or played instruments. AR 6425; AR 6475. Outside of school, Beth attended music therapy and horseback riding therapy every week. App. C 46a. Beth also belongs to a Girl Scout troop, attends religious classes, and played in her school band. *Id* at 47a; AR 6474-75.

Beth was making progress as a student in the regular education classroom, where she enjoyed and learned from the frequent interaction with her nondisabled classmates. Nevertheless, the School District decided to remove her from the regular classroom and segregate her in a self-contained special education classroom many miles away from her community and peers.

III. PROCEEDINGS BELOW

In 1997, the School District formalized its intention to remove Beth from her regular school classroom and bus her to a special education classroom in another school district with children who are largely non-communicative. App. 48a; AR 2322-38. Because Beth thrives in a literacy-rich and language-filled environment, particularly one where she interacts and communicates with peers who can respond to her, Beth's parents strongly disagreed with this recommendation. AR 4365-74.

Beth's parents therefore sought a due process hearing under the IDEA. IDEA, 20 U.S.C.A. § 1400 *et seq.* In order to determine what was best for Beth, her parents and the School District agreed to have Joseph Vaal, Ph.D., a school psychologist

and former administrator with the special education cooperative providing services for Beth independently evaluate her. AR 3822. After evaluating Beth, Dr. Vaal determined that she could be appropriately educated in a regular classroom in Lake Bluff. AR 10449; AR 3759-60. The School District disregarded this recommendation. AR 2312.

After numerous failed attempts at resolution, the matter proceeded to an administrative hearing. The IHO did not find that the School District's proposed placement of Beth was better than that conferred in regular school, nor did he conclude that she could not receive educational benefit from her regular school placement. *See* App. C 78a-79a. The IHO also noted that he found the conflict between Beth's parents and the School District "difficult, if not impossible to resolve" on the basis of the evidence presented at the hearing, nor could he "find decisive testimony or evidence in the record" to credit one side's report over the other. AR 78a. Nonetheless, he determined that the School District made an "adequate" effort in determining that Beth should be segregated. *Beth B. v. Van Clay*, 282 F.3d 493 (7th Cir. 2002), *in* Appendix A at 6a (hereinafter "App. A").

The experts who testified on Beth's behalf stated that placement in a regular classroom in her neighborhood school with a modified curriculum and special education support provides Beth with an appropriate education in the least restrictive environment. One of Beth's private therapists testified, not only that a regular classroom was the best placement for Beth, but also that placing her in special education classroom would be like a "death sentence" for Beth, because it would completely cut off her communication "life-line." Tr. at 307-08. The District, on the other hand, believes that Beth can only receive benefit from placement in a self-contained special education classroom with children who also have disabilities.

Beth's parents appealed to the U.S. District Court for the Northern District of Illinois under the IDEA, the Americans with Disabilities Act, and Section 504 of the Rehabilitation Act.

App. B 13a-14a. After briefing on cross-motions for summary judgment, the district court granted summary judgment in favor of the School District. App. B 39a. The district court noted correctly that the School District bore the burden of proof at the administrative level, yet agreed with the IHO's equivocal decision that the segregated placement was appropriate as it was "likely to benefit Beth." App. B 23a.

Beth's parents then appealed to the Seventh Circuit Court of Appeals. The Seventh Circuit held that, despite her progress toward the goals set for her by the School District, Beth was not receiving a satisfactory education — in the academic sense — in the regular school environment. A panel affirmed the decision of the district court and soon thereafter denied Beth's parents' petition for a rehearing in the Seventh Circuit, with a suggestion for a rehearing *en banc*. This petition for a writ of certiorari followed.

REASONS FOR GRANTING THE WRIT

I. THE SEVENTH CIRCUIT'S DECISION CONFLICTS WITH THE TEXT AND LEGISLATIVE HISTORY OF THE IDEA AS WELL AS WITH THE THIRD AND NINTH CIRCUITS, BECAUSE THE COURT FAILED TO APPLY THE PRESUMPTION IN FAVOR OF MAINSTREAMING AND INSTEAD DEFERRED TO THE SCHOOL DISTRICT'S DECISION WITHOUT CONDUCTING A PROPER REVIEW

In light of Congress' express command that students like Beth be educated in the least restrictive environment and its creation of a grievance procedure to protect the rights of students with disabilities and their parents, the Seventh Circuit erred when it deferred to the School District's decision about the appropriate placement for Beth.[5] The text and enactment history of the IDEA show that Congress intended for school districts to mainstream

5. The Seventh Circuit endorsed a system of total deference to the school district when it affirmed an administrative decision that deferred entirely to the School District's placement decision. *See generally* App. A.

students with disabilities "whenever possible." *Bd. of Educ. v. Rowley*, 458 U.S. 176, 202 (1982).

Congress recognized that school districts would sometimes need to be pushed to educate children with disabilities alongside their nondisabled peers and Congress, through the enforcement provisions of the IDEA, told the courts to do the pushing. Given a range of appropriate educational options for a child, it is up to the courts to ensure, through their review process, that school districts choose the placement and method that properly educates a student with disabilities "in the least restrictive environment." IDEA § 1412(a)(5)(A); 34 C.F.R. § 300.551.

Yet the Seventh Circuit's approach — in direct conflict with the Third and Ninth Circuits — endorses deference to a school district's segregated placement without requiring it to prove that removal of the student from the regular classroom is necessary. This "rubber stamp" approach to the IDEA essentially voids its enforcement provisions and strips children with disabilities of their right to challenge a school district's placement. If courts must always defer to a school district's "expertise" in resolving a conflict between a school and a child, then all parents and children lose before the fight even begins.

Preserving the rights of students with disabilities and their parents to enforce the mainstreaming presumption is an issue of exceptional importance that should be addressed by this Court.

A. The Seventh Circuit's deference to the School District's placement conflicts with the plain language and legislative history of the IDEA, because the Lake Bluff School District failed to meet the burden Congress imposed upon school districts that seek to remove disabled children from the regular classroom

The IDEA creates a presumption that children with disabilities should be educated in regular classrooms. States receiving federal funds must ensure that children with disabilities "are educated with children who are not disabled" to the "*maximum* extent appropriate." IDEA § 1412(a)(5)(A) (emphasis added). School districts must prevent unnecessary

"special education, separate schooling, or other removal of children with disabilities from the regular education environment." *Id.* In fact, students with disabilities may be segregated "only when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and materials *cannot* be achieved satisfactorily." *Id.* (emphasis added).

While Congress did not mandate any particular educational method, and recognized that some students with disabilities should not be educated in the regular classroom, *Rowley*, 458 U.S. at 181 n.4, the words "maximum" and "cannot" in the text make plain Congress' intent that schools educate students with disabilities and their nondisabled peers together "whenever possible." *Id.* at 202. Congress intended to limit school districts' choices in some respects by conditioning receipt of federal funds on school district's compliance with the LRE requirement. If a student's disability can be accommodated within a range of methods and placements, the IDEA compels the school district to choose the method and placement that provides for the most mainstreaming.

The IDEA's enactment history reinforces the text's plain meaning. As this Court noted, "Congress was concerned about the apparently widespread practice of relegating handicapped children to private institutions or warehousing them in special classes." *Sch. Comm. of Burlington v. Dep't of Educ.*, 471 U.S. 359, 373 (1985). Not content to let school districts police themselves, Congress established an appeals process for students with disabilities and their parents to assert their rights under the IDEA — including the right to be educated with nondisabled peers. IDEA § 1415(a); H.R. Rep. No. 94-332, at 15 (June 26, 1975); 121 Cong. Rec. 23,703 (1975) (statement of Rep. Brademas).

The author of these procedures, Congressman Miller, indicated that mainstreaming was to be the status quo: "[C]hildren ought to remain in a regular classroom until such time as it is determined, on the basis of sound testing and joint consultation with parents and the child, that it is in the best interest of the student to be placed in a special class."

121 Cong. Rec. 25,540 (1975). Moreover, Congressman Miller believed, as was later reflected in law,

> the burden of proof in terms of the effectiveness of a program ought to rest with that administrator or teacher who seeks for one reason or another to remove a child from a normal classroom; to segregate him or her from nonhandicapped children; to place him in a program of special education.

Id.

School districts bear the burden of proving by a preponderance of the evidence, at least at the administrative level, that a placement meets the IDEA's mainstreaming requirements. *Walczak v. Florida Unio Free Sch. Dist.*, 142 F.3d 119, 122 (2d Cir. 1998); *Clyde K. v. Puyallup Sch. Dist. No. 3*, 35 F.3d 1396, 1398-99 (9th Cir. 1994); *Furhmann v. East Hanover Bd. of Educ.*, 993 F.2d 1031, 1034-35 (3d Cir. 1993).[6]

While courts are to give "due weight" to the result of the administrative proceedings, courts are "to make an independent decision as to whether the requirements of the Act have been satisfied." *Lachman v. Illinois State Bd. of Educ.*, 852 F.2d 290, 293 (7th Cir. 1988); *see also Teague Indep. Sch. Dist. v. Todd L.*, 999 F.2d 127, 131 (5th Cir. 1993); *Tice v. Botetourt County Sch. Bd.*, 908 F.2d 1200 (4th Cir. 1990). Logically, then, Congress' combination of the presumption in favor of mainstreaming and independent judicial review requires that, if the school district cannot prove by a preponderance of the evidence that one placement is superior to another, the court should require the school district to choose the less restrictive placement.

However, in Beth's case, when it affirmed the IHO's decision, the Seventh Circuit, like the district court before it, endorsed a deferential approach that shifts the burden of proof

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6. The Third Circuit concluded that the IDEA requires school districts to bear this burden at every level of appeal where the LRE standard is concerned. *Oberti v. Bd. of Educ.*, 995 F.2d 1204, 1218 (3d Cir. 1993).

to the parents, turning the IDEA's mainstreaming presumption on its head. During the longest administrative hearing in Illinois state history, both sides presented experts and evidence about Beth's abilities and the proper placement for a child with Rett Syndrome. Beth's parents offered experts who had worked closely with Beth for years, and who testified that other children with cognitive disabilities were being successfully educated in regular classrooms in other school districts. *See, e.g.*, AR 7084-7091; AR 7119. Nonetheless, the IHO sided with the School District for no reason other than that *it was the School District*, and rubber stamped its decision.

Given the lack of information about the proper educational setting for children with Rett Syndrome, the IDEA's presumption in favor of mainstreaming should have governed. *See* App. C 78a. But the IHO reached the opposite conclusion: in the absence of hard facts, he decided, the school district's choice, rather than Congress', prevails. While he admitted he "would be hard pressed if he had to make a decision about the kinds of programs likely to provide benefit (even in the limited *Rowley* sense) for the Student in this case . . . ," he did not believe "that he must address this issue in order to assess the appropriateness of the school district's proposed placement." App. C 79a. Instead of applying the standard established by Congress, the IHO substituted an entirely new standard, reasoning that a placement met the IDEA's mainstreaming requirements if the school district makes a "careful and competent analysis that includes reasonable efforts to obtain relevant information . . . ." App. C 80a; App. C 91a.

Thus, the appeals process designed to protect the rights of students with disabilities was reduced to an inquiry into whether the School District put on evidence that it jumped through the proper hoops. Beth's parents were forced to disprove something which had not been proven. Rather than requiring the School District to prove that Beth could not be educated in a regular classroom, the IHO placed Beth's parents in the unenviable position of proving that their child was worthy of education in the regular classroom.

Despite the fact that this deferential standard is exactly contrary to Congress' test and finds no support in either the text or the legislative history of the IDEA, both the district court and the Seventh Circuit endorsed it. According to the district court, "there have not been sufficient studies to determine . . . how to best educate students with this disorder. When there is no consensus among educators, all a school district can do is review the available literature then exercise its professional judgment as to how to best educate the student." App. B 21a. The Seventh Circuit likewise found that "[t]he school officials' decision about how best to educate Beth is based on expertise that we cannot match. . . . The placement shows a concern both for her development and for keeping her mainstreamed, to an appropriate extent, with her nondisabled peers." App. A 11a.

This approach converts what was intended by Congress to be a substantive burden of proof into a mere procedural one. In other words, school districts need not offer hearing officers or courts proof that their placements actually comply with the IDEA — only that the school officials conducted research before choosing the placements. Indeed, the IHO's opinion allows school districts to place children with disabilities in special education so long as the school district has made the placement decision in apparent good faith. *See* App. C 82a, 86a. Furthermore, the approach enables a school district to use the lack of information about a particular child's disability to invalidate the IDEA's mainstreaming presumption. Just as before the enactment of the IDEA's predecessor, under the Seventh Circuit's standard, school districts now may segregate students with disabilities even absent a sound basis for doing so. The result is that, under this standard, the grievance procedure Congress designed to ensure the IDEA's goal of mainstreaming students with disabilities becomes nothing more than a rubber stamp for any school district's placement decision.

B. The Seventh Circuit's deference to school districts squarely conflicts with other circuits' interpretations of the IDEA

The panel's decision in *Beth B.* is not the only Seventh Circuit case that advocates abject deference to school district decisions without leaving much room for independent review. In *Heather S. v. Wisconsin,* the court agreed with a school district's restrictive placement, simply deferring to the experts assembled as part of the child's IEP team: "[b]ecause each child's social and academic educational needs are different we rely on the IEP procedures to determine the correct mix." 125 F.3d 1045, 1057 (7th Cir. 1997). Admitting that there was "more than one solution to the problem of best educating [the student]," the Seventh Circuit nonetheless declared that a court is "particularly incapable of making such judgments, which is why it must defer to trained educators . . . ." *Id.* at 1057. This approach completely eviscerates the IDEA's protections for the rights of students with disabilities and their parents.

The Third and Ninth Circuits, by contrast, have rejected this approach. The Third Circuit would not "read the Supreme Court's salutary warnings against interference with educational methodology as an invitation to abdicate our obligation to enforce the statutory provisions [of the IDEA]." *Polk v. Susquehanna Intermediate Unit 16,* 853 F.2d 171, 184 (3d Cir. 1988); *see also Oberti v. Bd. of Educ.,* 995 F.2d 1204, 1214 (3d Cir. 1993) ("It is our duty to enforce the statutory requirement." (citing *Polk*, 853 F.2d at 184)). The Ninth Circuit observed that, "if the views of school personnel regarding an appropriate educational placement for a disabled child were conclusive, then administrative hearings conducted by an impartial decisionmaker would be unnecessary." *Ojai Unified Sch. Dist. v. Jackson,* 4 F.3d 1467, 1476 (9th Cir. 1993).

In fact, the Third Circuit recognized that it is precisely because a school district has educational expertise at its disposal that it must bear the burden when seeking to segregate students with disabilities. The Third Circuit requires school districts to

prove at every level of appeal that removing a child from a regular classroom is necessary. *Oberti*, 995 F.2d at 1214. The school district is in the best position to prove its case because it has superior educational expertise, better access to relevant information, and control over witnesses with daily access to the child. *Id.* at 1219. The presumption in favor of mainstreaming, it held, "would be turned on its head if parents had to prove that their child was worthy of being included, rather than the school district having to justify a decision to exclude the child from the regular classroom." *Carlisle Area Sch. v. Scott P.*, 62 F.3d 520, 533 (3d Cir. 1995) (quoting *Oberti*, 995 F.2d at 1219).

Given the hearing officer's inability to decide, based on the available evidence, that segregated special education was the "least restrictive environment appropriate," App. C 78a, the Third and Ninth Circuits would have held that the School District failed to carry its burden of proof, and that Congress' statutory presumption for mainstreaming must control. By contrast, the Seventh Circuit deferred to the School District in a way that eviscerates the rights Congress provided to students with disabilities. This Court must intervene to resolve the conflict among the circuits and to ensure that Congress' intent is carried out.

II. BOTH THE SEVENTH CIRCUIT'S INTERPRETATION OF THE LRE REQUIREMENT AND OTHER CIRCUITS' LRE BALANCING TESTS CONFLICT WITH THE TEXT OF THE IDEA AND REQUIRE PARENTS TO PROVE THAT THEIR CHILD WITH A DISABILITY IS WORTHY OF REGULAR EDUCATION

The Seventh Circuit's deferential approach ignores the IDEA's mainstreaming presumption and exacerbates the disarray among the courts of appeals. By considering the FAPE and LRE requirements separately, the Seventh Circuit assumes that the school district's proposed placement is appropriate, and effectively shifts to parents the burden of proving that another

less restrictive placement would also be appropriate. Yet even if it had adopted one of the other circuits' balancing tests, the Seventh Circuit would have misinterpreted the LRE requirement. The LRE tests invented by the Sixth, Fifth, and Ninth Circuits add factors not found in the IDEA, and courts may use these new considerations to justify a school district's decision to remove children with disabilities from regular education.

This Court should reject these approaches and enforce the IDEA's presumption in favor of mainstreaming with a definitive interpretation of the LRE requirement based solely on the statute's text and regulations. Drawing on this Court's interpretation of the FAPE requirement in *Rowley* and Congress' intent that students with disabilities be mainstreamed where appropriate, this Court should hold that students with disabilities who can receive some educational benefit in the regular classroom with necessary aids and services should be entitled to remain there.

A. When the Seventh Circuit isolated the FAPE and LRE requirements, it placed the burden on parents to prove the school's placement is not the LRE, ignoring Congress' intent and creating a conflict with the settled law of the D.C., Third, and Fifth Circuits

This Court has determined that the IDEA's requirement that school boards provide a FAPE means that they must "confer some educational benefit upon the handicapped child." *Rowley*, 458 U.S. at 200. Beth's parents argue that the LRE and the FAPE are interdependent and must be read together. App. A 7a; *see also Carlisle*, 62 F.3d at 535; *Sherri A.D. v. Kirby*, 975 F.2d 193, 206-07 (5th Cir. 1992); *Kerkam v. Superintendent, D.C. Pub. Schs.*, 931 F.2d 84, 87 (D.C. Cir. 1991). If a child is receiving a FAPE in a regular classroom, that is the "least restrictive environment" appropriate under the IDEA. However, the Seventh Circuit requires the FAPE requirement to be determined separately, and in isolation from the LRE requirement: "The FAPE provision and LRE provision are two

sides of the same IEP coin. The [FAPE] requirement is absolute. . . . The [LRE] is relative. . . ." App. A 7a.

By considering the IDEA requirements separately — each with its own independent test — the Seventh Circuit effectively reads the statutory presumption in favor of mainstreaming out of the statute. Under the Seventh Circuit's approach, once a school district's placement meets the FAPE standard — regardless of how the school district provides "a free and appropriate education" — the school district's proposed placement becomes the starting place for the LRE analysis. The parents must then bear the burden of offering another, less restrictive alternative, reversing the burden of proof intended by Congress. But when the two requirements are considered together, the school district must meet them both at once, properly placing the burden on the school district of proving that the child is receiving a free appropriate public education in the least restrictive environment, as Congress intended.

Moreover, the Seventh Circuit's isolation of the two requirements creates a conflict with the D.C., Fifth, and Third Circuits, each of which have read the FAPE and LRE requirements together. For example, in *Kerkam*, the D.C. Circuit defined the least restrictive environment as "one that confers *some educational benefit* but most closely approximates education with nonhandicapped children in the school that the handicapped child would attend if he had no handicap." 931 F.2d at 86 (emphasis added). The D.C. Circuit held that the district court could not require the school to reimburse parents for a disabled child's education at a residential facility when the hearing officer had concluded that "a nonresidential placement could confer some educational benefit" upon the child. *Id.* at 88. Despite the fact that the segregated placement would confer more educational benefit, the court concluded, "*Rowley* precludes our taking that factor into account so long as the public-school alternative confers some educational benefit." *Id.* at 87.

The Fifth and the Third Circuits also read the IDEA's FAPE and LRE requirement together. *Sherri A.D.*, 975 F.2d at 206; *Carlisle*, 62 F.3d at 535-36. The Fifth Circuit, citing both *Rowley* and *Kerkam*, upheld a magistrate judge's order transferring a student with cognitive disabilities from a School for the Blind to a less restrictive public school placement. *Sherri A.D.*, 975 F.2d at 206. The court held that, "[w]hile the School for the Blind might be capable of providing services from which Sherri may obtain 'educational benefit' (the standard for 'appropriateness' of free public education under *Rowley*), the School for the Blind is not the least restrictive environment in which Sherri may receive appropriate educational services." *Id.* The Third Circuit also followed this approach in *Carlisle*, concluding that an IEP "must not only be designed to confer some educational benefit, but it also must deliver the programming in the least restrictive educational environment" and that the LRE "command" limited the court's authority to order a placement more restrictive than one that conferred "some educational benefit." 62 F.3d at 535.

Under the Seventh Circuit's formulation, parents must prove that a less restrictive placement would also be "appropriate." But had Beth's case been considered in the circuits holding that the two requirements are interdependent, the fact that Beth received "some educational benefit" from her placement would have meant keeping her in the regular classroom. This Court should intervene to enforce the IDEA's mainstreaming presumption and resolve the conflict created by the Seventh Circuit's decision.

B. The LRE balancing tests adopted by other circuits ignore Congress' intent and weaken the IDEA's presumption in favor of mainstreaming by adding factors not found in the text

As discussed above, while this Court has interpreted the FAPE requirement as calling for school districts to provide students with disabilities with, at a minimum, "some educational benefit," *Rowley*, 458 U.S. at 200, it has not yet interpreted the

LRE requirement. Indeed, different lower courts, in the absence of direct guidance, have formulated conflicting tests to determine whether a school district has mainstreamed a student with a disability "to the maximum extent appropriate." *See, e.g., Roncker v. Walter,* 700 F.2d 1058, 1063 (6th Cir. 1983). There is fundamental disagreement among the courts of appeals and the lower courts, not only about how much courts should defer to school districts, but also about the factors courts should apply when evaluating a school's placement decision. The disarray among the circuits makes the rights of students with disabilities contingent on geography, creating an urgent need for this Court's intervention. But more importantly, none of the tests give sufficient weight to the IDEA's presumption in favor of mainstreaming, and all of them add countervailing factors not found in the IDEA's text.

Because Beth was making progress toward the goals set out in her IEP, Beth belonged in the regular classroom under a fair application of any of the circuits' tests. Nonetheless, in adopting multi-factor tests, instead of simply enforcing the IDEA's text and implementing regulations, the circuit courts have abandoned Congress' intent and instead adopted their own preferences. Indeed, when it has interpreted the IDEA, this Court has rejected such balancing tests at every opportunity. *See Rowley,* 458 U.S. at 187-88; *Cedar Rapids Cmty. Sch. Dist. v. Garret F.*, 526 U.S. 66, 75-76 (1999). In *Rowley,* this Court held that, even though the definition of "appropriate" was not completely comprehensive, courts may not "abandon[ ] the quest for legislative intent" and create their own tests. 458 U.S. at 188. Rather, this Court was "loath to conclude that Congress failed to offer any assistance" in defining the meaning of "appropriate," and proceeded to interpret Congress' intent using the language of the statute and its implementing regulations. *Id.* at 187. Similarly, with regard to the LRE requirement, the text, together with the implementing regulations, provide a satisfactory framework for evaluating school districts' placement decisions.

Each of the other circuits' tests purports to follow the IDEA's text, but each quickly departs from the text in a way that weakens the Act's presumption in favor of mainstreaming. The *Roncker* "feasibility" test has been adopted by the Sixth, Fourth, and Eighth Circuits. *Roncker,* 700 F.2d at 1063; *Devries v. Fairfax County Sch. Bd.,* 882 F.2d 876, 878-79 (4th Cir. 1989); *A.W. v. Northwest R-1 Sch. Dist.,* 813 F.2d 158, 163 (6th Cir. 1987). In *Roncker,* the Sixth Circuit failed to refer to the text requiring that a child with disabilities be removed "*only* when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services *cannot* be achieved satisfactorily." *Compare Roncker*, 700 F.2d *passim with* IDEA § 1412(a)(5)(A) (emphasis added). Instead, the court simply declared that a special education placement meets the "least restrictive environment" requirement if what makes a segregated environment superior cannot be duplicated in the regular classroom, if the child is disruptive,[7] or if marginal benefits from mainstreaming are far outweighed by benefits from regular education. *Roncker*, 700 F.2d at 1063. The court also declared, without support from the IDEA's text, that the cost of mainstreaming is a factor. *Id.*

In 1989, the Fifth Circuit rejected the *Roncker* test because the court felt it "necessitates too intrusive an inquiry into the educational policy choices that Congress deliberately left to state and local school officials." *Daniel R.R. v. State Bd. of Educ.,* 874 F.2d 1036, 1046 (5th Cir. 1989). Even so, while purporting to follow the text of the IDEA, the Fifth Circuit quickly resorted to judicially-constructed standards and balancing tests, concluding that a court "must examine the child's overall educational experience in the mainstreamed environment, balancing the benefits of regular and special education for each individual child." *Id.* at 1049.[8] The Eleventh Circuit adopted

7. The district court in this case concluded that any disruptions caused by Beth are "infrequent and relatively mild," and thus the court did "not ascribe much weight to it." App. B 34a.

8. Under the *Daniel R.R.* test, courts ask first whether education (Cont'd)

this test as well. *See Greer v. Rome City S.D.*, 950 F.2d 688, 696 (11th Cir. 1991).

The Third Circuit also rejected *Roncker* and adopted the *Daniel R.R.* test, but for the opposite reason: *Daniel R.R.* was superior, the Third Circuit held, because it required schools to provide for more integration. *Oberti*, 995 F.2d at 1215. Unlike the Fifth Circuit, the Third Circuit stressed the importance of mainstreaming under the IDEA because of the non-educational benefits it provides to students with disabilities and nondisabled students alike: "Congress understood that a fundamental value of the right to public education for children with disabilities is the right to associate with nondisabled peers." *Id.* at 1216-17. Thus, while it adds factors not found in the text, the Third Circuit's approach comes closest to properly enforcing the IDEA's mainstreaming presumption.

Finally, the Ninth Circuit in 1994 adopted a four-factor balancing test that is also at odds with the plain language of the IDEA. The Ninth Circuit would have courts weigh four judicially-constructed factors evenly, without regard to the IDEA's presumption in favor of mainstreaming. *See Sacramento City Unified Sch. Dist. v. Rachel H. by Holland*, 14 F.3d 1398, 1404 (9th Cir. 1994).[9]

(Cont'd)
in the regular classroom, with the use of supplementary aids and services, can be achieved satisfactorily for a given child. *Daniel R.R.*,874 F.2d. at 1048. The court in *Daniel R.R.* considered four factors under this part. *See id.* at 1048-50. Next, if education in a regular classroom cannot be achieved satisfactorily, the court asks whether the school district has mainstreamed the disabled student to the maximum extent appropriate. *Id.* at 1050.

9. The *Holland* test requires courts to consider four separate factors: (1) the academic benefits of placement in a mainstream setting, with any supplementary aids and services that might be appropriate; (2) the nonacademic benefits of placement in a mainstream setting, such as language and behavior models provided by nondisabled students; (3) the negative effects the student's presence may have on the teacher and other students; and (4) the cost of the regular classroom placement. 14 F.3d at 1404.

While each of these circuits believed that the IDEA invites courts to weigh various factors to strike a balance between educational benefits and mainstreaming, Congress' intent can only be fully effectuated by applying the text of the IDEA and its regulations without creating new standards and balancing tests. This Court should take the opportunity to resolve the conflicts among the circuits.

C. This Court should resolve the conflicts among the circuits by holding that, under the IDEA, students with disabilities who can receive an educational benefit in the regular classroom with necessary aids and services should be entitled to learn alongside their nondisabled peers

This Court should hold that students with disabilities like Beth, who can, without disrupting the class, receive an educational benefit in the regular classroom assisted by the full range of necessary aids and services should remain in the regular classroom. The text of the IDEA, the implementing regulations, and Congress' intent compel this conclusion.

As this Court has determined, a school district's placement satisfies the FAPE requirement if the student receives "some educational benefit." *Rowley,* 458 U.S. at 200. Thus, provided that the student with a disability does not disrupt other students' learning, the regular classroom is the LRE for a child if she can receive "some educational benefit" there. In other words, as the text says, schools may remove children with disabilities "only when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and materials *cannot* be achieved satisfactorily." IDEA § 1412(a)(5)(A) (emphasis added). The regulations set forth the efforts school districts must make to provide the student with an educational benefit in the regular classroom. The general curriculum must be modified as needed, *see* 34 C.F.R. § 300.552(e), "the full range of supplementary aides and services" must be provided, and the school district must consider "any harmful effect" on the child from special education. 64 Fed. Reg. 12,471 (Mar. 12, 1999).

Taken together, the text and regulations provide a standard for applying the IDEA's presumption in favor of mainstreaming and carrying out Congress' intent, "to open the door of public education" to all qualified children and "educate handicapped children with nonhandicapped children whenever possible." *Garret F.*, 526 U.S. at 78 (quoting *Rowley*, 458 U.S. at 202). If they can receive an educational benefit, students with disabilities should not be denied access to the public school classroom.

III. THE SEVENTH CIRCUIT'S DEFINITION OF A "SATISFACTORY" EDUCATION EFFECTIVELY READS THE PRESUMPTION IN FAVOR OF MAINSTREAMING OUT OF THE IDEA AND CONFLICTS WITH THE THIRD CIRCUIT, THUS CREATING AN IMPORTANT QUESTION OF FEDERAL LAW THAT MUST BE SETTLED BY THIS COURT

The Seventh Circuit effectively read the presumption in favor of mainstreaming out of the IDEA when it focused on Beth's lack of *academic* progress in the regular classroom environment. Indeed, the court seemed to compare Beth's progress to that of her nondisabled peers — an approach in clear conflict with the purposes of the IDEA. Furthermore, the Seventh Circuit's holding conflicts with the Third Circuit's test, which directs courts to examine the benefits of regular education to both children with disabilities and their nondisabled classmates.

A. The Seventh Circuit's focus on Beth's lack of academic progress effectively reads the presumption in favor of mainstreaming out of the IDEA

In this case, the Seventh Circuit applied a far too rigorous standard when it found that Beth's educational achievement did not constitute a satisfactory education. App. A 11a. Indeed, while the Court recognized that Beth made *developmental* progress, it mistakenly focused on whether she made traditional *academic* progress when it concluded that her progress "[did] not constitute a satisfactory education." *Id.*

This standard conflicts with, indeed, it essentially reads out of the IDEA, the requirement that all children be mainstreamed to the maximum extent appropriate, regardless of whether they have cognitive disabilities that prevent them from making progress in the traditional academic sense. IDEA § 1412(a)(5)(A). This standard is at odds with Congress' intent, as the IDEA and its implementing regulations emphasize, that the mainstreaming of children with disabilities is intended to benefit both those children *and* their nondisabled peers. Furthermore, nowhere does the IDEA require that a child with disabilities learn the same skills, or at the same level, as her nondisabled peers.

Beth received numerous educational benefits from her regular school placement, and met a substantial number of the goals set out for her *by the School District* in her IEP. For example, the School District's own 1999 IEP progress report shows that (1) Beth greatly increased her ability to respond to a social greeting, substantially improving over her 1997 performance; (2) Beth reached near-mastery levels in the skill of responding to verbal requests to "look" or "touch;" (3) she showed progress in her ability to make choices between two different objects or activities, whereas two years earlier Beth's choices appeared random; and (4) Beth learned to activate a switch to engage in an activity, like music, at near-mastery levels. AR 2327-35. Furthermore, one of Beth's private therapists, Susan Norwell, testified that Beth had progressed in *thirteen* of the sixteen objectives *set by the School District. Beth B. v. Van Clay*, No. 00 C 4471, Pl.'s Ex. 5.

Rather than focus on these benefits, however, the Seventh Circuit, and the district court before it, focused almost entirely on Beth's progress in relation to the general school curriculum. For instance, the Seventh Circuit noted that "[h]er academic progress was virtually nonexistent. . . ." App. A 11a. The district court pointed out that she cannot "keep pace with the class" and she has what amounts to a "parallel curriculum." App. B 32a.

The Seventh Circuit's opinion would require children with disabilities to meet an impossible, and fundamentally unfair, standard. In order for a child with disabilities to show progress — to show that she is receiving an educational benefit — the Seventh Circuit holds she must do *more* than meet her individually-tailored IEP goals. Simply put, Beth's inability to achieve at the same level as her nondisabled peers cannot be the basis for deciding that she does not receive an educational benefit from the regular classroom. *See Houston Indep. Sch. Dist. v. Bobby R.*, 200 F.3d 341, 349 (5th Cir. 2000). Beth's achievements will seem small when measured by the standards of her nondisabled peers, but she should not be barred from education in a regular classroom simply because she achieves on a smaller scale than her nondisabled peers. Indeed, to measure her progress in such a way is to discount her achievements altogether. Even the School District concedes that "there are clearly some areas in which Beth has displayed some progress." AR 8401. That Beth cannot achieve along the same academic lines as her classmates is irrelevant to the individualized inquiry into educational benefit required by the IDEA. The progress Beth did demonstrate shows that she was making significant strides toward many of her goals; most importantly perhaps, she was learning how to communicate with other people. Given the nature and severity of Beth's disability, this is a satisfactory education for her — indeed, it is the optimal one for her.

B. The Seventh Circuit's focus on Beth's lack of academic progress conflicts with the Third Circuit which emphasizes the non-academic benefits of placing children with disabilities in the regular education environment

The Seventh Circuit's focus on academic progress conflicts with the Third Circuit's decision in *Oberti v. Board of Education*. 995 F.2d at 1216-17. There, the Third Circuit applied a fair, workable test for what constitutes a satisfactory education, as it measured "progress" in relation to the abilities of the particular student, not in comparison to her nondisabled peers. *Id.* Indeed,

the progress made by nondisabled students in relation to ones with disabilities is utterly irrelevant. *Id.* Children with disabilities must be measured in terms of their IEP, which is what the *Oberti* court called the "'centerpiece' of the [IDEA]." *Id.* at 1213 n.16. For instance, the *Oberti* court stressed that social development, which the Seventh Circuit dismissed as trivial, is a factor constituting educational progress. *Id.* Furthermore, the Third Circuit acknowledged that courts should compare "the educational benefits the child will receive in a regular classroom (with supplementary aids and services) and the benefits the child will receive in the segregated, special education classroom." *Id.* at 1216.

However, the *Oberti* court, in sharp contrast to the Seventh Circuit, stressed that "the court must pay special attention to those *unique benefits* the child may obtain from integration in a regular classroom which cannot be achieved in a segregated environment." *Id.* Indeed, the *Oberti* court noted that Congress' intent in enacting the IDEA was that children with disabilities would learn "to associate, communicate and cooperate with nondisabled persons. . . ." *Id.* at 1216 n.23. Such is "essential to the personal independence of children with disabilities." *Id.* The goal of the IDEA, after all, is that children with and without disabilities learn together as much as possible, for the benefit of both. Of course, children with or without disabilities are more likely to form and maintain friendships if they advance together from grade to grade.[10]

The Seventh Circuit's standard, in fact, flatly ignores the benefits children like Beth receive in the regular classroom. *Id.* at 1216-17 ("a child may only be able to absorb a minimal amount of the regular education program, but may benefit enormously from the language models that his nonhandicapped peers provide" (quoting *Daniel R.R. v. State Bd. of Educ.*, 874 F.2d 1036, 1049 (5th Cir. 1989))). Moreover, the Seventh Circuit did not consider the appropriateness of placing Beth in a segregated environment before recommending it. 34 C.F.R.

10. *See supra* note 2.

§ 300.552(d). Indeed, the bus ride required to reach the nearest ELS classroom (45 minutes to an hour) would be exhausting for Beth, leaving her unable to participate in the planned activity. AR 11413-14; AR 10672; Tr. 308. Perhaps worst of all, however, is that the court in this case failed to acknowledge that a "fundamental value of the right to public education for children with disabilities is the right to associate with nondisabled peers." *Oberti*, 995 F.2d at 1216-17.

The Seventh Circuit's opinion requires students with disabilities to justify their presence in regular education classrooms by progressing at the same level as their nondisabled peers or moving quickly to catch up to them. Not only is this standard impossible to reach for many children who, like Beth, suffer from disabilities that make comparison with their nondisabled peers unfair, it also flies in the face of the IDEA and the Third Circuit's interpretation thereof.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

JULI WILSON MARSHALL*
KATHLEEN RAVEN GURROLA
JASON D. ROSENBERG
ROBERT H. KNOWLES
LATHAM & WATKINS
233 S. Wacker Drive
Sears Tower, Suite 5800
Chicago, Illinois 60606
(312) 876-7700

Attorneys for Petitioners

* *Counsel of Record*